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BEFORE THE ARIZONA CORPORATION COMMISSION

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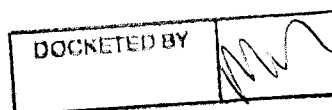
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Arizona Corporation Commission
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JUN 16 2009



PAC-WEST TELECOMM, INC.,

Complainant,

QWEST CORPORATION,

Respondent.

) DOCKET NOS. T-01051B-05-0495
) T-03693A-05-0495
)
) **RESPONSE OF PAC-WEST**
) **TELECOMM, INC. TO QWEST**
) **NOTICE OF SUPPLEMENTAL**
) **AUTHORITY**
)
)

Pac-West Telecomm, Inc. ("Pac-West") files the following Response to Qwest Corporation's Notice of Supplemental Authority.

I. December 2007 FCC Brief in *In re Core Communications, Inc.* No. 07-1446 (Exhibit 1).

Qwest cites an eighteen-month-old FCC brief in support of its opposition to Pac-West's Motion for Summary Determination ("Motion"). This FCC brief was available to Qwest for reference and argument long before Pac-West even filed its motion. Qwest's belated "Notice of Supplemental Authority," with respect to this brief, is merely an

attempt to circumvent the limitations imposed by the Administrative Law Judge on the submission of argument and briefs.

II. FCC Brief in *Core Communications Inc. v. FCC* No. 08-1365 (Exhibit 2).

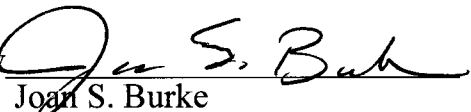
A legal brief submitted to a court by an agency is not an “agency action” which has the force and effect of law, nor can it be “authority” to which a lower court must defer. As explained by the Supreme Court, “[i]nterpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This type of agency interpretation is entitled to deference only if it is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Hermes v. Sec’y of Health & Human Servs.*, 926 F.2d 789, 791 n.1 (9th Cir. 1991). The FCC brief is not persuasive. At most, the brief advises that the VNXX traffic compensation issue, raised in the *Core* case, has not been decided and is not ripe for decision on appeal. Even this analysis, however, is undercut by the brief’s conclusion that any argument that 251(b)(5) traffic is exclusively local would be “insubstantial, in any event” because 251(b)(5) is “not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services.”¹ The FCC Staff’s interpretation of the FCC Mandamus Order, as laid out in the *Core* brief, does not have the force and effect of law as would an FCC Order.

¹ Exhibit 2 to Qwest Notice, at 45-46, citing the *Mandamus Order*.

True federal legal action on intercarrier compensation – either by the D.C. Circuit Court of Appeals,² the Ninth Circuit Court of Appeals,³ or the FCC⁴ – is expected in the coming 6-9 months. In anticipation of new federal developments, the Washington Public Utilities Commission has raised with Pac-West, Qwest and Level 3 the possibility of holding in abeyance a similar VNXX remand (from district court) pending federal action.⁵ Pac-West would support a similar pause in this proceeding to await federal developments that could affect this case.

RESPECTFULLY SUBMITTED this 16th day of June 2009.

OSBORN MALEDON, P.A.

By 
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² *Core Communications, Inc. Et Al. v. FCC*, No. 08-262 (Order No. 08-1365) (final briefs due on June 19, 2009; oral argument has not been scheduled).

³ *Qwest Corporation v. Level 3 Communications LLC, et al.* No. 08-15887 (on appeal from the United States District Court for the District of Arizona, No. 2:06-CV-2130-SRB). This case is briefed, but oral argument has not been scheduled.

⁴ Petition of Blue Casa Communications, Inc. for Declaratory Ruling Concerning Intercarrier Compensation for ISP-Bound VNXX Traffic, FCC WC Docket No.09-8. Fully briefed awaiting FCC action.

⁵ See *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket UT-053036 and *Level 3 Communications, LLC, v. Qwest Corporation*, Docket UT-053039.

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filed this 16th day of June, 2009, with:

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